**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**

**White, PJ, and Sawyer and Saad, JJ**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

**Supreme Court No.** 120021
**Court of Appeals No.** 223059
**Trial Court No.** 99-165135-FC

-vs-

**STEPHEN J. McNALLY,**

Defendant-Appellant.

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**Oakland County Prosecutor**
Attorney for Plaintiff-Appellee

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**SUSAN M. MEINBERG (P 34433)**
**MARLA R. McCOWAN (P57218)**
Attorneys for Defendant-Appellant

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# DEFENDANT-APPELLANT'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

**STATE APPELLATE DEFENDER OFFICE**

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## STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Oakland County Circuit Court by jury trial or bench trial, and a Judgment of Sentence was entered on September 24, 1999. A Claim of Appeal was filed on October 25, 1999 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated September 24, 1999, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This Court now has jurisdiction pursuant to MCR 7.301(A)(2).

## STATEMENT OF QUESTION INVOLVED

**WAS DEFENDANT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, WHERE THE PROSECUTOR ELICITED EVIDENCE IN HIS CASE-IN-CHIEF OF DEFENDANT'S POST-ARREST SILENCE; WAS DEFENDANT ALSO DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE DEFENSE COUNSEL FAILED TO OBJECT?**

The Michigan Court of Appeals answered "No".

Defendant-Appellant answers "Yes".

Plaintiff-Appellee would answer "No".

## STATEMENT OF FACTS

Defendant-Appellant STEPHEN J. MCNALLY was charged with first-degree murder, MCL §750.316, and failure to stop at the scene of a personal injury accident, MCL §257.617. He was convicted of second-degree murder, MCL §750.317 and failure to stop at the scene, after a jury trial in the Oakland County Circuit Court, the Honorable Rudy J. Nichols presiding. On September 24, 1999, Mr. McNally was sentenced to 20-50 years imprisonment for second-degree murder, and 2-5 years imprisonment for failure to stop at the scene of an accident.

The instant offense occurred on February 10, 1999 about 11:15 p.m. on John R and 12-1/2 Mile Roads in Madison Heights. The prosecution alleged that Mr. McNally and Mr. VanDorn spent the afternoon and evening drinking alcohol. At some point after leaving Tel-Way Hamburgers in Mr. McNally's truck, they got into an altercation which resulted in Mr. McNally receiving an abrasion to his face and Mr. VanDorn exiting the truck. The prosecution alleged that Mr. McNally intentionally ran over Mr. VanDorn with his truck, returned to look at the body, and then left the scene of the accident. The defense alleged that Mr. McNally's truck was mechanically defective and that he was intoxicated.

Tim Barron testified that he worked with Mr. VanDorn at a roofing company. He also lived with Mr. VanDorn in a friend's garage in Madison Heights (Apx. pg. 34a-36a). On February 10, 1999, during the afternoon hours, he and Mr. VanDorn went to Augie's Bar, where they met Mr. McNally for the first time. They all played pool together and drank beer. When Mr. Barron and Mr. VanDorn left Augie's, Mr. McNally offered them a ride home. On the way home, they stopped and bought a 12-pack of beer (Apx. pg. 36a-44a). When they arrived home, they split the 12-pack three ways and they drank schnapps. Mr. VanDorn and Mr. McNally left together about 7:30 or 8:00 p.m. to go to another bar (Apx. pg. 45a-48a). Both men were

"buzzed," but not "falling down drunk." According to Mr. Barron, Mr. VanDorn was an alcoholic (Apx. pg. 50a-51a).

Brenda Zapton, an employee at Tel-Way Hamburgers at Eleven Mile and John R Roads in Madison Heights, testified that Mr. VanDorn and Mr. McNally came into Tel-Way between 10:30 and 11:00 p.m. on February 10, 1999. While they waited for their order, the two men were laughing and joking. When they left, she saw them get into a two-tone brown truck. Mr. McNally got into the driver's seat and Mr. VanDorn got into the passenger's seat. She did not see any cuts or blood on Mr. McNally's face when they left (Apx. pg. 52a-61a).

John Dalling, a pizza delivery person at Hungry Howie's at 12-1/2 Mile and John R Roads, testified that he was walking to his car in the parking lot about 11:15 p.m. on February 10, 1999, when he observed a man walking in the middle of John R Road. The man was walking north and carrying a cowboy hat and a coffee cup. The man appeared to be drunk, as he was stumbling in the road (Apx. pg. 61a-68a). After Mr. Dalling put his pizzas on the car, he noticed a brown and white truck going northbound on John R Road. The truck pulled up along side of the man for a second, and then accelerated towards LaSalle Street. After about 80-85 yards, the truck then did a U-turn, and got into the southbound curb lane. According to Mr. Dalling, the truck increased speed and crossed over from the curb lane and hit the man who was walking in the center lane. Mr. Dalling estimated that the truck was going about 40-45 mph; he testified that he did not hear any brakes squeal (Apx. pg. 67a-71a). According to Mr. Dalling, the victim flew a few feet and landed in the northbound curb lane. After the truck hit the victim, the truck continued driving in the southbound lane. Mr. Dalling ran back into Hungry Howie's and yelled for someone to call 911 (Apx. pg. 72a-73a). When Mr. Dalling came back outside, he saw someone stop and go up to the victim. At that point, Mr. Dalling saw the brown and white truck

do a U-turn and head back towards the victim. He testified that the truck drove past the victim at about 10-15 mph and continued northbound. When the police arrived, Mr. Dalling pointed out the truck to them, as it was stopped at a red light at Thirteen Mile and John R Roads (Apx. pg. 74a-78a).

Matt Walsh testified that he was driving a commercial truck northbound on John R Road about 11:15 p.m. on February 10, 1999 when he noticed some headlights veer sharply and he saw something go over the hood. When he saw that there was something in his lane, he stopped and discovered that it was a person lying in the road (Apx. pg. 79a-83a). Mr. Walsh exited his truck and tried to assist the victim. At that point, he heard another person warn that the truck was coming back. Mr. Walsh saw a brown pickup truck slowly driving in the center turn lane. After the truck passed the victim, it drove away (Apx. pg. 83a-85a). When the police arrived, Mr. Walsh gave them a description of the truck and said that he could not be far away (Apx. pg. 85a-86a).

Officer Robert Backlund testified that he blocked traffic near the victim and that Officer Hillman pursued the truck. The victim was lying on his stomach and there was a pool of blood by his head; he was not able to speak and could only make a slight grunting noise. The fire department arrived and worked on the victim (Apx. pg. 87a-92a).

Officer Ronald Hillman testified that he arrived at the scene, received a description of the truck, and pursued the truck that was stopped at a red light at Thirteen Mile and John R Roads. After the truck pulled over, Officer Hillman ordered the driver to shut off the vehicle and to exit the vehicle. Officer Hillman identified Mr. McNally as the driver. When Mr. McNally exited the truck, Officer Hillman noticed that he smelled of intoxicants, his eyes were red and watery,

and his speech appeared slurred. Officers Cacicedo and Siladke began the field sobriety tests, which Mr. McNally did not pass (Apx. pg. 93a-101a).

Officer Hillman noticed that there was a cowboy hat in the front grill area of the truck and there were some small blood spatters (Apx. pg. 102a-105a). He testified that the interior of the truck contained a blanket, a bag of burgers and wrappers, and a bowling ball without a bag. The truck was impounded (Apx. pg. 105a, 112a). According to Officer Hillman, Mr. McNally was polite and was answering questions. He appeared to have an abrasion on his right cheek, and dried blood around his upper lip (Apx. pg. 106a-107a). He did not see Mr. McNally fall to the ground, pass out, or vomit. The prosecutor elicited testimony that Mr. McNally did not ever indicate at the scene that he blacked out or that he could not remember what happened (Apx. pg. 107a-108a).

Officer Cacicedo testified that he participated in the stop of Mr. McNally's truck in the Comp USA parking lot. He testified that Mr. McNally smelled of intoxicants and he asked Mr. McNally if he had been drinking. Mr. McNally stated that he had been to Augie's. Officer Cacicedo then asked Mr. McNally if he would submit to some field sobriety tests, and Mr. McNally agreed (Apx. pg. 113a-115a). After Mr. McNally performed the field sobriety tests, Officer Cacicedo formed the opinion that he was too intoxicated to drive a motor vehicle, and he read Mr. McNally his PBT rights. The results of the PBT were .207 (Apx. pg. 115a-120a). Officer Cacicedo identified Exhibit 6 as the videotape of the tests given to Mr. McNally, and the tape was played for the jury (Apx. pg. 121a-125a). Mr. McNally was arrested and transported to the police station. A search warrant was obtained and he was transported to the hospital to obtain blood samples at 1:20 a.m. (Apx. pg. 126a-128a). On the way back from the hospital, Mr. McNally allegedly told Officer Cacicedo that he thought the officer didn't like this part of his

job, and Officer Cacicedo indicated "not this part." Mr. McNally then allegedly stated that "Well, I'm pretty much well fucked ain't I?" and Officer McNally stated, "Yes." (Apx. pg. 129a-130a). The prosecutor then elicited testimony that during that evening, Mr. McNally did not indicate that he lost control of the truck, that there was any mechanical defect with the truck, that he had blacked out, or that he could not remember things that had happened (Apx. pg. 130a).

On cross-examination, Officer Cacicedo testified that he did not include Mr. McNally's alleged statement in his police report (Apx. pg. 131a).

Dr. Rubin Ortiz-Reyes, a deputy medical examiner at the Oakland County Medical Examiners Office, testified that he performed the autopsy on Mr. VanDorn on February 11, 1999. According to Dr. Ortiz-Reyes, Mr. VanDorn suffered multiple injuries due to blunt force trauma (Apx. pg. 132a-140a).

Officer Siladke testified that he assisted in the stop of Mr. McNally's truck, that he observed the field sobriety tests, that he advised Mr. McNally of his chemical test rights, and that he administered two breathalyzer tests. The results of the 12:04 a.m. and 12:05 a.m. breathalyzer tests were .21 and .20, respectively (Apx. pg. 141a-150a). The prosecutor elicited testimony that Mr. McNally did not indicate that he didn't know what was going on, or that he blacked out, or that he could not remember (Apx. pg. 146a).

Officer Richard Lochbiler, an accident investigator with the Madison Heights Police Department, testified that he examined the pickup truck and noticed a hat embedded in the grill or radiator area, and that there was blood spattering on the hood and grill area (Apx. pg. 151a). After visiting the scene of the accident, Officer Lochbiler prepared a diagram and indicated where certain items were found (Apx. pg. 151a-158a).

Terrance McGran, a mechanic for the city of Madison Heights, testified that he inspected Mr. McNally's 1979 pickup truck on or about May 14, 1999 (Apx. pg. 159a). According to Mr. McGran, there were not any problems with the brakes or the steering. He testified that the ball joints were worn, but intact; that there was roughly 30 percent of the brake pad left on the brakes; that the parking brake was inoperable; that the catalytic converter was missing; the power steering belt was loose, which meant that more force would be needed to steer; and the power steering fluid was low (Apx. pg. 160a-166a). On cross-examination, Mr. McGran admitted that his inspection only lasted 30 minutes, and that he did not inspect the rear brakes, the brake fluid, the transmission, the carburetor linkage, or the throttle cable (Apx. pg. 170a-178a).

Sgt. Bruce Cupp testified that he and Sgt. Jorgenson interviewed Mr. McNally on February 11, 1999 about 1:30 p.m. (Apx. pg. 179a). After administering a PBT and obtaining results of zero, Sgt. Jorgenson read Mr. McNally his Miranda rights and Mr. McNally made a statement. Sgt. Cupp identified Exhibit 15 as the taped interview with Mr. McNally, and Exhibit 16 as the transcript of that taped interview (Apx. pg. 16a-33a). The taped interview was played for the jury, but not transcribed (Apx. pg. 179a-185a).

Dr. Rubin Adatsi, a toxicologist with the Michigan State Police, testified about the effects of a blood alcohol level between .15 and .30 (Apx. pg. 186a). According to Dr. Adatsi, the central nervous system would be most severely affected. The muscles or person's movement would also be affected. A person would suffer from the following: an inability to process information clearly, an unsteady gait, confusion, disoriented, an increased reaction time, slurred speech, drowsy, inhibitions would be decreased, transient memory loss, and blackouts (Apx. pg. 186a-189a). According to Dr. Adatsi, a physiological blackout involves the cessation of certain human functions such as movement, decision-making, and coordination. Dr. Adatsi testified that

a person suffering a physiological blackout would not be able to drive a car, execute a U-turn, or process the need to stop at a red light (Apx. pg. 189a-191a). He opined that an alcoholic would be able to tolerate the alcohol a little better and would manifest less of an impairment; however, this would not be the case if there was long-term alcohol abuse and pathological changes in the brain (Apx. pg. 192a-193a).

On cross-examination, Dr. Adatsi testified that he did not interview Mr. McNally and he did not know his history of alcoholism or alcoholic blackouts. He testified that if someone suffered an alcoholic blackout while driving, he would expect the vehicle to go off course; he indicated that someone could recover from the blackout at some point. He agreed that falling asleep at the wheel was a fair analogy (Apx. pg. 194a). Dr. Adatsi also testified that a person with a .15 to .30 blood alcohol level would be unsteady, confused, disoriented, have an increased reaction time, and they may not be able to perceive that they have been in an accident (Apx. pg. 196a-199a).

After the prosecution rested, the defense called Anthony Zolinski. Mr. Zolinski, an auto mechanic, testified that he inspected and photographed Mr. McNally's truck. According to Mr. Zolinski, Mr. McNally's truck had several problems, including problems with the front end alignment, chunks of pads missing from the front brake pads, cracks in the front brake pads, rear brakes that were at the point of replacement, a leaking rear axle seal, leaking brake fluid, a very loose power steering belt, low power steering fluid, a cracked bracket on the power steering pump, broken clips on the throttle cable that allowed it to become dislodged, a damaged fan shroud assembly, ignition wires in the area of the throttle linkage, and a slipping transmission assembly. He also testified that the signal lights were not working properly (Apx. pg. 200a-223a). Mr. Zolinski testified that he took the truck for a test drive and that he could hardly steer

the vehicle (Apx. pg. 212a-214a). He also testified that based on the problems with the truck, the operator could accelerate and the accelerator pedal might stick (Apx. pg. 219a-220a). Based on his inspection of the truck, Mr. Zolinski opined that the vehicle should not be driven on public streets, as it did not accelerate, steer or brake properly; it was his opinion that the truck was a "death trap." (Apx. pg. 223a).

On cross-examination, Mr. Zolinski agreed that to take the vehicle out on a road and drive it at speeds of 45 mph, would be creating a great risk of either seriously injuring or causing death to other people on the road (Apx. pg. 226a-227a).

After the defense rested, the prosecution called Thomas Satawa as a rebuttal witness. Mr. Satawa, an auto mechanic, testified that he accompanied Mr. Zolinski during the inspection of the truck and during the test drive (Apx. pg. 228a-230a). Mr. Satawa testified that during the test drive, he did not notice any problems and Mr. Zolinski did not appear to have any problems with the steering, braking, or acceleration (Apx. pg. 231a-233a).

After arguments by counsel and instructions by the trial court, the jury deliberated and returned with a verdict of guilty of second-degree murder and failure to stop at the scene (Apx. pg. 234a).

Sentencing was held on September 24, 1999. The parties agreed that the guidelines range was 15-25 years (Apx. pg. 235a-237a). The trial judge sentenced Mr. McNally to 20-50 years imprisonment for second-degree murder, plus 2-5 years imprisonment for failure to stop (Apx. pg. 238a).

After appealing as of right, the Court of Appeals affirmed Defendant's convictions in an unpublished opinion dated July 20, 2001 (White, PJ, and Sawyer and Saad, JJ) (Apx. pg. 239a-240a). This Court granted leave to appeal as to the within issue on October 30, 2002.

## ARGUMENT

**DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, WHERE THE PROSECUTOR ELICITED EVIDENCE IN HIS CASE-IN-CHIEF OF DEFENDANT'S POST-ARREST SILENCE; DEFENDANT WAS ALSO DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE DEFENSE COUNSEL FAILED TO OBJECT.**

Sgt. Hillman participated in the stop of Mr. McNally near Thirteen Mile Road and John R (Apx. pg. 97a-108a). During direct examination of Sgt. Hillman in the prosecution's case-in-chief, the prosecutor elicited the following testimony:

> "Q Did he ever indicate to the best of your knowledge during the scene that he had blacked out?
>
> A No.
>
> Q Did he ever indicate to you at the scene that he couldn't remember what happened?
>
> A No." (Apx. pg. 108a).

Officer Cacicedo also participated in the stop and arrest of Mr. McNally. Officer Cacicedo performed the field sobriety tests and the PBT. He also arrested Mr. McNally, transported him to the station, prepared a search warrant for his blood, and transported him to and from the hospital to have his blood drawn (Apx. pg. 113a-130a).

During direct examination of Officer Cacicedo in the prosecution's case-in-chief, the prosecutor elicited the following testimony:

> "Q At any point in time that evening, did the Defendant indicate to you that he had lost control of the truck?
>
> A No.

Q Did he ever indicate to you that there was any mechanical defect with the truck?

A No.

Q Did he ever indicate to you that he had blacked out that evening?

A No.

Q Did he ever indicate to you that he couldn't remember things that had happened that evening?

A No." (Apx. pg. 130a).

Officer Michael Siladke testified that he also assisted in the stop of Mr. McNally's vehicle, that he observed the field sobriety tests, and that he read the chemical test rights to Mr. McNally. On direct examination, the prosecutor elicited the following:

"Q Did you ever see him fall down?

A No.

Q Pass out?

A No.

Q Vomit?

A No.

Q Indicate that he didn't know what was going on?

A No.

Q Indicating that he had blacked out?

A No.

Q Indicating that he couldn't remember?

A No." (Apx. pg. 146a-147a).

There was no objection by defense counsel.

Mr. McNally submits that the prosecutor denied him his state and federal constitutional rights to due process and a fair trial by eliciting testimony regarding his post-arrest silence. US Const, Ams V, XIV; Const 1963, art 1, §17. Further, Mr. McNally submits that defense counsel was ineffective in failing to object to the prosecutor's elicitation of this testimony. US Const, Ams VI, XIV; Const 1963, art 1, §20; Strickland v Washington, 466 US 668 (1984); People v Pickens, 446 Mich 298 (1994). The Court of Appeals clearly erred in affirming this issue.

The standard of review for this constitutional issue is *de novo*. People v Echavarria, 233 Mich App 356, 358 (1999). Although defense counsel did not object, this Court may review an unpreserved issue involving a significant constitutional question. People v Alexander, 188 Mich App 96, 101 (1991).

The admission of evidence that, upon his arrest, Defendant McNally exercised his Fifth Amendment right to remain silent was prejudicial error. Both the United States Supreme Court and Michigan law forbid any comment on a defendant's post-arrest exercise of the right to silence. Informing the jury that Defendant was silent, exercising his rights under the Fifth Amendment, was a direct and intentional violation of this Defendant's Fifth and Fourteenth Amendment rights. US Const, Ams V, XIV. That inference was prejudicial and improper, as it led the jurors to infer that Mr. McNally had something to hide when he failed to tell the police officers that he blacked out, that he could not remember what happened, that he lost control of the truck, and/or that the truck had a mechanical defect.

While some cases have broadened the use prosecutors can make of pre-trial silence of the accused, the law is still firm that no adverse inference can be raised as to the exercise of post-arrest, post-Miranda silence. See People v McReavy, 436 Mich 197, 207 n. 2 (1990); Doyle v

Ohio, 426 US 610 (1976); Fletcher v Weir, 455 US 603 (1982); Wainwright v Greenfield, 474 US 284 (1986); Gravley v Mills, 87 F3d 779 (CA 6, 1996); People v Bobo, 390 Mich 355 (1973); People v Gallon, 121 Mich App 183 (1982). Permitting the use of custodial silence to infer guilt would "place an impermissible penalty on the exercise of the accused's right against self-incrimination." Gallon, supra at 187. Prosecutors and police officers have long been presumed to know this rule, and to take careful steps to avoid revealing to jurors an exercise of silence. See People v Swan, 56 Mich App 22, 35 (1974).

In Wainwright v Greenfield, supra, the United States Supreme Court dealt with a situation similar to the case at bar. The defendant in Greenfield raised an insanity defense, which under Florida law required the prosecution to rebut the defense with substantive evidence of sanity. As part of their proofs, the state prosecutors introduced evidence that when read his Miranda rights at a custodial interrogation, the accused declined to answer questions and requested to see any attorney - actions the prosecution argued were substantive evidence of sanity. On habeas review, the United States Supreme Court found reversible error, holding it was fundamentally unfair and a violation of Due Process to allow the accused's assertion of his rights to be used as a sword against him at trial. The Greenfield Court stated:

> "We find no warrant for the claimed distinction in the reasoning of Doyle [v Ohio, supra] and of subsequent cases. The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations." 474 US at 292.

The leading Michigan case on point continues to be People v Bobo, supra. In Bobo, the precise issue on appeal was prosecutorial comment on the accused's failure to come forward with his theory of defense prior to trial. The Supreme Court held that his trial testimony could not be impeached with the fact that following his arrest he did not make a statement to the police outlining that defense theory. In the most quoted section of that opinion, the Court wrote:

> "We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. `Nonutterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did." 390 Mich at 359.

See also Doyle v Ohio, supra.

While the breadth of the Bobo rule has been restricted and clarified in subsequent decisions by the Michigan Supreme Court, it is still fully applicable, as in the case at bar, where the silence at issue occurs post-arrest. Such silence is only admissible to impeach a defendant's claim that he did not remain silent but made statements to the police consistent with his exculpatory testimony. People v Collier, 426 Mich 23 (1986); People v Cetlinski, 435 Mich 742 (1990); People v McReavy, supra; People v Sutton (After Remand), 436 Mich 575 (1990); People v Sholl, 453 Mich 730 (1996); People v Hackett, 460 Mich 202 (1999). See also Portuondo v Agard, 529 US 61 (2000). In Sutton, supra, 592-593, 599, the Court stated:

> "United States Supreme Court cases decided subsequent to our holding in Bobo establish that when a defendant takes the stand and testifies the privilege against self-incrimination is waived and the defendant may be impeached with both prearrest silence and postarrest pre-Miranda silence without violating the Fifth Amendment. Jenkins v Anderson, 447 US 231, 100 S Ct 2124, 65 L Ed 2d 86 (1980); Fletcher v Weir, 455 US 603, 102 S Ct 1309, 71 L Ed 2d 490 (1982)(per curiam).
>
> Where silence follows Miranda warnings, Fourteenth Amendment due process bars the use of such evidence to impeach a defendant's exculpatory explanation at trial provided that the

> defendant does not claim 'to have told the police the same version upon arrest.' Doyle v Ohio, supra, pp 619-620, n 11. Thus Doyle establishes that the discrepancy between a defendant's exculpatory story at trial and his postarrest, postwarning silence is not available to the state to impeach the credibility of the defendant's exculpatory testimony. In this situation, silence has no probative value because '[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights.' Doyle, p 617. Moreover, it is fundamentally unfair to use a defendant's silence against him when he had been implicitly promised that if he remained silent he will not be penalized.
>
> ***
>
> Construing People v Bobo as coextensive with federal precedent, we hold that impeachment of exculpatory testimony with pre- or postarrest pre-Miranda silence is permissible under the Michigan Constitution. Likewise, a defendant's right to remain silent is protected by the Fourteenth Amendment which precludes the use of a defendant's silence following Miranda warnings to impeach an exculpatory story."

In Cetlinski, supra, the Court adopted an evidentiary approach and found that where the use of a defendant's silence for impeachment purposes is constitutionally permissible, the use of such silence becomes a question of relevancy and a person's silence may constitute a statement of a party-opponent under MRE 801(d)(2). Id., at 747-748.

The Court of Appeals in People v Alexander, supra, 104, explained the distinction as follows:

> "[I]f the prosecutor's questioning and comments concerned silence which occurred after Miranda warnings were given, the issue is a constitutional one. If not, the issue is strictly an evidentiary matter. Thus, we conclude that the issue concerning receipt of Miranda warnings is determinative of the present case."

In the instant case, the extent of the issue is one of constitutional magnitude, as the prosecutor's questioning of the officers during its case-in-chief concerned Defendant's post-arrest silence. This evidence insinuated to the jury that Mr. McNally's silence at the scene with Sgt.

Hillman, Officer Cacicedo, and Officer Siladke was an inference of his guilt. There can be no excuse for the prosecutor's egregious conduct. The prosecutor's conduct in this case was a foul blow that amounted to blatant and egregious Bobo/Doyle error.

The Court of Appeals below found that the challenged testimony was not post-Miranda. (Apx. pg. 239a). However, the record is silent regarding whether Miranda warnings were given promptly upon Defendant's arrest. At a minimum, this case should be remanded to develop a record to determine whether Miranda warnings were given.

A new trial is warranted because the prosecutor's injection of the silence issue into trial was deliberate. See People v Alexander, supra, 104-105. Further, the prosecutor cannot claim that he was using Defendant's post-arrest silence to impeach Defendant, as the prosecutor elicited the testimony from the officers in his case-in-chief.

The prosecution's flagrant violation of Mr. McNally's Fifth and Fourteenth Amendment rights could not have been harmless in this case. Arizona v Fulminante, 499 US 279, 295 (1991); Chapman v California, 386 US 18, 24 (1967); People v Swan, supra.

This Court cannot fairly conclude that it is convinced beyond a reasonable doubt that the admission of Defendant's post-arrest silence did not contribute to the guilty verdict. Fulminante, 499 US at 295-302 (noting "profound impact" that incriminating statements have upon jury); Id at 312 (noting that such statements can have a "devastating" and "dramatic effect" on the course of a trial); Chapman, 386 US at 24. In this context, any inculpatory inference arising from the Defendant's silence could have had a significant impact on the jury's verdict. One or more of the jurors may have felt that Defendant's failure to tell his exculpatory version to the police was inconsistent with his defense at trial.

Perhaps the strongest statement of the rule is the comment of the Court in People v Swan, supra. In Swan, the Court found that testimony that the accused refused to speak to the police subsequent to his arrest was clear error under Bobo. The only question in the case was whether this constitutional error was harmless beyond a reasonable doubt. While finding that the evidence in that case was so overwhelming, including a later confession by the accused, to render the error harmless, the Swan Court issued the following warning for future cases:

> "We will find it difficult in the future to believe that prosecutors and police are ignorant of the well-established principle of law which forbids comment upon an accused's silence or that clear violations of the principle arise from inadvertence. Deliberate violations of this rule may lead us to reverse convictions even where evidence might be overwhelming. The prosecutor who comments, or elicits comment, on a defendant's silence thus risks the loss of a perfectly good case for no reason." 56 Mich App at 35. (Emphasis added).

The impact in the case at bar was to raise an inculpatory inference that Defendant McNally had something to hide when he failed to provide his side of the story to the police upon his arrest. As the cases make clear, it is a violation of the Fifth and Fourteenth Amendment protections for the jury to use an exercise of this fundamental constitutional protection as a sword against him. Mr. McNally is entitled to a new trial.

Mr. McNally submits that defense counsel was clearly ineffective under Strickland and Pickens, by failing to object to the prosecutor's elicitation of Defendant's post-arrest silence.

A defense attorney is ineffective when his or her actions or omissions are not the result of "reasonable professional judgment," and when his performance is "deficient." Strickland v Washington, supra, at 687, 690, 692-693, 700; People v Pickens, supra. A defendant can establish ineffectiveness by showing that counsel's errors were so serious that he was not functioning as counsel guaranteed by the Sixth Amendment and that the errors prejudiced the defense. Strickland, supra at 687; People v Pickens, supra. In the instant case, defense counsel

was ineffective by failing to object. At the very least, counsel should have realized that the prosecutor's line of questioning was constitutionally suspect. Combs v Coyle, 205 F3d 269, 286 (CA6, 2000). These errors clearly prejudiced Defendant, and he is entitled to a new trial.

## RELIEF REQUESTED

For all of the reasons stated herein, Defendant-Appellant respectfully requests that this Court reverse his convictions and remand this matter for a new trial.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: 

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